# EXPLANATORY STATEMENT

## Issued by authority of the Minister for Housing and Assistant Treasurer

*Taxation Administration Act 1953*

*Taxation Administration (Tax Debt Information Disclosure) Declaration 2019*

Subsection 355-72(5) in Schedule 1 to the *Taxation Administration Act 1953* (the Act) provides that the Minister may declare classes of entities for the purposes of section 355-72 in Schedule 1 to the Act.

The purpose of the *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019* (the Declaration) is to declare a class of entities whose tax debt information may be disclosed to credit reporting bureaus by taxation officers under subsection 355-72(1) in Schedule 1 to the Act.

Section 355-25 in Schedule 1 to the Act provides that it is an offence for a taxation officer to record or disclose protected information that has been acquired by them as a taxation officer. The exception to the offence in section 355-72 in Schedule 1 to the Act permits taxation officers to disclose the tax debt information of an entity to credit reporting bureaus, to enable those credit reporting bureaus to prepare, update or issue credit worthiness reports in relation to the entity. However, the exception only applies to tax debt information of an entity that is in the class of entities declared by the Treasurer.

Entities that fall within the declared class of entities under the Declaration are entities that:

* are registered in the Australian Business Register, other than as deductible gift recipients, complying superannuation funds, registered charities or government entities; and
* have one or more tax debts, the total of which is at least $100,000, that have been overdue for more than 90 days; and
* after taking reasonable steps, the Commissioner of Taxation (the Commissioner) has been able to confirm with the Inspector‑General of Taxation that no complaint remains active by the entity concerning the disclosure of tax debt information of the entity that is, or could be, the subject of an investigation under paragraph 7(1)(a) of the *Inspector‑General of Taxation Act 2003.*

If an entity is effectively engaging with the Commissioner to manage a tax debt or taking action in accordance with the law to dispute the debt, that tax debt will not be taken into account when working out whether the entity has a total tax debt of at least $100,000 that has been overdue for more than 90 days.

Details of the Declaration are set out in Attachment A.

As required by the Act, the Treasurer consulted with the Information Commissioner and Inspector-General of Taxation before making the Declaration.

The Declaration and the draft legislation were released for public consultation between 10 January 2018 and 9 February 2018. A revised version of the instrument was released for a second round of public consultation between 24 July 2019 and 21 August 2019. Nineteen submissions were received in the first round of consultation, thirteen in the second round. Non‑confidential submissions will be published on the Treasury website.

The Declaration is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Declaration commences on the 60th day after the day it was registered on the Federal Register of Legislation.

The Declaration is expected to result in minimal ongoing compliance costs for those businesses already not engaging to manage their tax debts.

A Statement of Compatibility with Human Rights is at Attachment B.

**ATTACHMENT A**

**Details of the *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019***

Section 1 – Name

This section specifies that the name of the Declaration is the *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019*.

Section 2 – Commencement

This section prescribes that the Declaration commences on the 60th day after the day the Declaration is registered.

Section 3 – Authority

This section provides that the Declaration is made under the *Taxation Administration Act 1953*.

Section 4 – Definitions

This section provides definitions for the purposes of the Declaration.

Sections 5 – Interpretation

Section 5 provides that an expression used in the Declaration (other than those defined in section 4) have the same meaning as an expression used in the *Income Tax Assessment Act 1997.*

Section 6 – Declared class of entities–taxpayers carrying on a business or similar venture with total tax debts of $100,000 or more for more than 90 days and who fail to effectively engage with the Commissioner

The purpose of the Declaration is to declare a class of entities whose tax debt information may be disclosed to credit reporting bureaus by taxation officers.

Section 6 sets out the core criteria for determining whether an entity falls within the class of entities for the purposes of section 355-72 in Schedule 1 to the Act.

Tax debt information cannot be disclosed to credit reporting bureaus if an entity does not fall within the declared class of entities for which disclosure of tax debt information is permitted. If an entity no longer falls within the class of entities declared in the Declaration, taxation officers can disclose information to credit reporting bureaus so they can be instructed to remove the tax debt information of such an entity.

Only an entity for which all of the following apply will fall within the declared class of entities:

* the entity is registered in the Australian Business Register other than as a deductible gift recipient, complying superannuation fund, registered charity or government entity;
* the entity has one or more tax debts, the total of which is at least $100,000, that have been overdue for more than 90 days; and
* after taking reasonable steps, the Commissioner has been able to confirm with the Inspector General of Taxation that no complaint remains active by the entity concerning the disclosure of tax debt information of the entity that is, or could be, the subject of an investigation under paragraph 7(1)(a) of the *Inspector General of Taxation Act 2003*.

*Certain entities registered in the Australian Business Register*

Section 6 provides that an entity falls within the declared class of entities only if (in addition to meeting the other requirements) the entity is registered in the Australian Business Register under the *A New Tax System (Australian Business Number) Act 1999*. Despite being eligible for registration in the Australian Business Register, the following entities do not fall within the declared class, as their main purpose and operation is not the carrying on of a business or similar venture:

* deductible gift recipients;
* complying superannuation funds;
* registered charities; and
* government entities.

‘Deductible gift recipient’ is defined in section 30-227 of the *Income Tax Assessment Act 1997* and includes entities such as a public library, museum or art gallery in Australia, a national trust of a state or territory, a public hospital, a public university, certain research centres, and certain environmental organisations.

‘Complying superannuation fund’ has the meaning given by section 45 of the *Superannuation Industry (Supervision) Act 1993* (section 995‑1 of the *Income Tax Assessment Act 1997* refers). A fund will be a complying superannuation fund if it has been given a notice from the Regulator to that effect and has not subsequently received a notice that it is not a complying fund under section 40 of the *Superannuation Industry (Supervision) Act 1993*.

‘Registered charity’ refers to an entity registered under the *Australian Charities and Not-for-profits Commission Act 2012* as a charity (section 995-1 of the *Income Tax Assessment Act 1997* refers).

‘Government entity’ has the meaning given by section 41 of the *A New Tax System (Australian Business Number) Act 1999* (section 995-1 of the *Income Tax Assessment Act 1997* refers). This definition provides that ‘government entity’ includes a Department of State of the Commonwealth, a Department of State of a State or Territory, a Department of the Parliament established under the *Parliamentary Service Act 1999*, and an Executive Agency or Statutory Agency within the meaning of the *Public Service Act 1999*.

*Entities with a tax debt, of which at least $100,000 is overdue for more than 90 days*

Section 6 provides that an entity falls within the class of entities if (in addition to meeting the other requirements) the entity has one or more tax debts, of which at least $100,000 is overdue for more than 90 days.

This thresholdensures that only the entities carrying a significant overdue tax debt may have their tax debt information disclosed to credit reporting bureaus.

*Example: Applying the debt threshold test*

Red Pty Ltd operates a business. Red Pty Ltd has an income tax debt of $50,000 that was due and payable 95 days ago. Red Pty Ltd also has an activity statement debt of $60,000 that was due and payable 40 days ago.

Red Pty Ltd has a total tax debt of $110,000, of which $50,000 is more than 90 days overdue. Therefore, Red Pty Ltd does not meet the debt threshold test.

For the purposes of working out whether an entity has one or more tax debts meeting the tax debt threshold criterion, certain tax debts are to be disregarded. Generally, the tax debts that will not contribute to meeting this criterion are those for which the entity is effectively engaging with the Commissioner to manage or is taking action in accordance with the law to dispute.

*Entering into and complying with payment arrangement*

A tax debt will not contribute to meeting the tax debt threshold criterion to the extent that the entity has entered into an arrangement with the Commissioner to pay the relevant tax debt by instalments, and the entity is complying with that arrangement as agreed.

Section 255-15 in Schedule 1 to the Act permits an entity to pay a tax-related liability by instalments under an arrangement between the entity and the Commissioner. The terms of the arrangement might require, for example, an entity to pay a certain amount at a certain frequency. If an entity enters into an arrangement of this kind and complies with the terms of the arrangement, those tax debts subject to the arrangement will not contribute to meeting the tax debt threshold criterion. If for example, an entity defaults on the terms of the arrangement with the Commissioner, such as by failing to make a payment by a certain time, or of a certain amount, the tax debt will contribute to the entity meeting the tax debt threshold criterion until the default is rectified or a new arrangement has been entered into.

*Active application for release from liabilities in cases of serious hardship*

A tax debt will not contribute to meeting the tax debt threshold criterion to the extent that the entity has a valid and active application lodged with the Commissioner under section 340-5 in Schedule 1 to the Act.

Section 340-5 in Schedule 1 to the Act allows a taxpayer to apply to the Commissioner to release them from certain liabilities in cases where serious hardship would be suffered if the taxpayer were required to satisfy the liability.

A tax debt will not contribute to meeting the tax debt threshold criterion only the first time such an application for release from the tax debt has been made.

The application for release is considered active if it has not been withdrawn and either the Commissioner has not made a decision in relation to the application or notice of the Commissioner’s decision on the application has been served on the entity within the last 60 days. This ensures that the relevant tax debt cannot be disclosed during the 60 day period where a taxpayer could object to the Commissioner’s decision to not release all or part of the tax debt.

*Active dispute relating to the tax debt*

A tax debt will also not contribute to meeting the tax debt threshold criterion to the extent the entity is formally disputing a decision in relation to the debt.

An entity could be formally disputing a decision in relation to the tax debt by:

* lodging a taxation objection with the Commissioner (which the Commissioner must respond to by making an objection decision); or
* applying for a review of an objection decision with the Administrative Appeals Tribunal or appealing to the Federal Court of Australia against an objection decision; or
* requesting a reconsideration of a reviewable decision which may affect the quantum of a superannuation fund’s tax debt with the relevant regulator; or
* applying for a review of a reviewable decision which may affect the quantum of a superannuation fund’s tax debt with the Administrative Appeals Tribunal; or
* making a complaint to the Inspector-General of Taxation that is, or could be, the subject of an investigation under paragraph 7(1)(a) of the *Inspector-General of Taxation Act 2003*.

Only an active dispute or complaint will result in the tax debt not contributing to meeting the tax debt threshold criterion. For example, where proceedings reviewing a decision relating to the tax debt have concluded or where an application for review has been withdrawn or refused, the dispute will not be considered to be active.

Generally, a tax debt will also not contribute towards meeting the tax debt threshold criterion during any periods an entity has to apply for a review of, or appeal decisions made in the course of disputing the tax debt.

If a taxpayer has lodged a taxation objection in relation to a tax debt and the Commissioner has made an objection decision within the last 60 days the tax debt will be disregarded. This ensures that the relevant tax debt cannot be disclosed during the 60 day period where a taxpayer could seek external review of the Commissioner’s decision by the Administrative Appeals Tribunal.

In contrast, it is not necessary to specify that a tax debt be disregarded during the period for making appeals to the Administrative Appeals Tribunal or Federal Court in relation to a reviewable decision under section 344 of the *Superannuation Industry (Supervision) Act 1993* in order to ensure tax debts are disregarded during such periods.

This is becausein those cases, the time period is either 21 or 28 days for lodging an appeal, which is equal to or less than the notice period that the Commissioner must provide to a taxpayer before first making a tax debt disclosure (see subparagraph 355‑72(1)(e)(ii) in Schedule 1 to the Act). In other words, even if the Commissioner were to issue a notice to disclose a tax debt the day after a reviewable decision is made or court decision handed down, the taxpayer will need to act within the notice period to lodge an appeal.

Tax debts are disregarded where proceedings of the Administrative Appeals Tribunal or Federal Court of Australia (including any related appeals) have not come to an end. This means the tax debt will not contribute towards meeting the tax debt threshold criterion during the period where such appeals have not come to an end.

Under paragraph 7(1)(a) of the *Inspector-General of Taxation Act 2003*, the Inspector-General can investigate action affecting an entity that is taken by a tax official, that relates to administrative matters under a taxation law, and that is the subject of a complaint by that entity to the Inspector-General. The Commissioner must take reasonable steps to confirm whether or not the Inspector-General has an active complaint from the entity relating to the tax debt that is, or could be, investigated. Where an entity has made a complaint to the Inspector‑General about a tax debt and the Inspector‑General is investigating, or could investigate, the complaint, the tax debt will not contribute to meeting the tax debt threshold criterion.

Reasonable steps that the Commissioner can take to confirm whether the entity has an active complaint with the Inspector-General may include, but are not limited to, checking the record of complaints the Inspector-General has notified the Commissioner of as being active or by requesting information from the Inspector‑General.

If the Commissioner’s proposed disclosure of an entity’s tax debt information is an initial disclosure, subparagraph 355-72(1)(e)(i) in Schedule 1 to the Act requires the Commissioner to consult with the Inspector-General. An initial disclosure is one that is not an update, correction or confirmation of tax debt information previously disclosed.

The Commissioner will satisfy this requirement in the Act by requesting and providing a reasonable timeframe for the Inspector-General to confirm whether or not the Inspector-General has any relevant active complaints in relation to the entity and taking into account any further recommendation of the Inspector-General that is relevant to the Commissioner’s decision to disclose the tax debt information of the entity. For example, there may not be an active complaint with the Inspector-General because an investigation into the complaint has concluded, but the requirement to consult in the Act would require the Commissioner to take into account any recommendation of the Inspector-General about a proposed disclosure.

Where the proposed disclosure is for the purpose of updating, correcting or confirming information previously disclosed, the Act does not require the Commissioner to consult with the Inspector-General and reasonable steps for the purposes of this Declaration would be satisfied by a more streamlined process. For example, checking a regularly updated record of active complaints notified to the Commissioner by the Inspector-General would constitute reasonable steps.

This criterion ensures that a taxation officer cannot disclose the tax debt information of an entity to credit reporting bureaus if that entity has lodged a complaint relating to their tax debt with the Inspector-General, and the Commissioner has been made aware of the complaint, until the complaint is resolved.

*Active complaint with Inspector-General of Taxation relating to proposed disclosure*

Section 6 provides that an entity falls within the declared class of entities only if (in addition to meeting the other requirements) after taking reasonable steps, the Commissioner has been able to confirm with the Inspector General of Taxation that no complaint remains active by the entity concerning the disclosure of tax debt information of the entity that is, or could be, the subject of an investigation under paragraph 7(1)(a) of the *Inspector General of Taxation Act 2003*.

This will have the effect of preventing taxation officers from disclosing the tax debt information of an entity to credit reporting bureaus if the Commissioner is aware of an active complaint made by that entity to the Inspector-General about the disclosure of their tax debt information.

The Commissioner must take reasonable steps to confirm whether or not the Inspector-General has an active complaint of this kind from the entity. Consistent with the process for complaints relating to the tax debt itself, reasonable steps may include checking the record of complaints the Inspector-General has notified the Commissioner of as being active or requesting information from the Inspector‑General.

As described above, the Act requires the Commissioner to consult with the Inspector‑General in relation to an initial disclosure. The Commissioner will satisfy this requirement in the Act by requesting and providing a reasonable timeframe for the Inspector-General to confirm whether or not the Inspector-General has any relevant active complaints in relation to the entity and taking into account any further recommendation of the Inspector‑General that is relevant to the Commissioner’s decision to disclose the tax debt information of the entity.

**ATTACHMENT B**

### Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019*

This Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Declaration

This Declaration outlines the class of entities whose tax debt information may be disclosed to credit reporting bureaus by taxation officers under the exception to the confidentiality of taxpayer information provisions in subsection 355-72(1) in Schedule 1 to the Act.

### Human rights implications

This Declaration engages the prohibition on arbitrary or unlawful interference with privacy contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

The Declaration engages the prohibition on arbitrary or unlawful interference with privacy to the extent that it authorises the disclosure of personal information relating to an individual. The Declaration specifies that a taxpayer is within the class of entity whose tax debt information may be disclosed if, amongst meeting other criteria, the taxpayer holds an Australian Business Number. Therefore, the Declaration authorises the disclosure of tax debt information relating to an individual, where the individual holds an Australian Business Number. For example, the tax debt information of a business operating as a sole trader structure will involve information relating to an individual.

The Declaration also authorises the disclosure of personal information, where the tax debt information of an entity is considered to be information about an individual who is reasonably identifiable (refer subsection 6(1) of the *Privacy Act 1988)*.

This Declaration is compatible with Article 17 of the ICCPR, as its engagement with the prohibition on interference with privacy will neither be unlawful nor arbitrary. The amendments are not arbitrary as the amendments are aimed at a legitimate objective and constitute an effective and proportionate means of achieving that objective.

The United Nations Human Rights Committee has stated, in their General Comment Number 16, that:

* ‘unlawful means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant [the International Covenant on Civil and Political Rights]’; and
* ‘the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’.[[1]](#footnote-2)

Authorising the disclosure of protected information relating to the tax debt of a taxpayer to a credit reporting bureau is aimed at a legitimate objective of protecting the wider community and is designed to support businesses by giving them the ability to make more informed decisions about who they do business with. When an entity avoids paying its tax debts together with the lack of visibility of those debts, it can have a significant impact on other businesses, employees and contractors. In addition, allowing taxation officers to disclose tax debt information where certain conditions and safeguards are met will encourage taxpayers to engage with the ATO to manage their tax debts.

Under the exception in subsection 355-72(1) in Schedule 1 to the Act, the Commissioner is authorised to disclose the tax debt information of a taxpayer to a credit reporting bureau where the conditions for disclosure in the legislation are satisfied and the taxpayer meets all the criteria set out in this Declaration.

The Declaration provides criteria for the lawful disclosure of a taxpayer’s tax debt information. The criteria operate to limit the scope of the discretion to disclose under section 355-72 in Schedule 1 to the Act, recognising that the impacts and consequences of these disclosures may be quite significant for some taxpayers. The criteria will ensure that only disengaged taxpayers carrying significant overdue tax debts will have their tax debt information disclosed to credit reporting bureaus. It will allow disclosure only when it would be a proportionate response, given the particular entity and the risk their tax debt represents to other businesses.

There are a number of ways a taxpayer can effectively engage to prevent the disclosure of their tax debt information to a credit reporting bureau set out in this Declaration. These are expected to encourage taxpayers to engage in the management of their tax debts and positively affect payment behaviour. For further information, see the Statement of Compatibility with Human Rights included in the explanatory memorandum accompanying the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019*.

### Conclusion

This Declaration is compatible with human rights as it is consistent with Article 17 of the ICCPR on the basis that its engagement of the prohibition on interference with privacy will neither be unlawful nor arbitrary. To this extent, the Declaration complies with the provisions, aims and objectives of the ICCPR.

1. United Nations Human Rights Committee*, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: http://www.refworld.org/docid/453883f922.html. [↑](#footnote-ref-2)